Exhibit D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff.

v.

LBRY, INC.,

Defendant.

No. 1:21-cv-00260-PB
February 23, 2022
2:00 p.m.

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TRANSCRIPT OF MOTION HEARING AND STATUS CONFERENCE
HELD VIA VIDEOCONFERENCE
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Plaintiff: Peter Moores, Esq.
Securities and Exchange Commission

For the Defendant: Keith Miller, Esq.
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Court Reporter: Brenda K. Hancock, RMR, CRR
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P R O C E E D I N G S

THE CLERK: This Court is in session and has for consideration a motion hearing and status conference in civil matter 21-cv-260-PB, U.S. Securities and Exchange Commission versus LBRY, Inc.

THE COURT: I've been informed that some members of the public have requested access to this hearing. We've granted those requests. People who are not admitted as parties or counsel need to keep their cameras off and their microphones muted throughout the hearing; and of, of course, it is forbidden to make any recording of this proceeding.

Okay. So, I have a Motion to Quash, I have a Motion to Modify Scheduling Order, and I have a Motion for Protective Order that's not ripe yet that I won't consider, unless the parties jointly ask me to.

Let's start with the Motion to Quash. I'll hear the SEC on that motion.

MR. MOORES: Thank you, your Honor. Peter Moores from the Securities and Exchange Commission. We filed the Motion to Quash the subpoena for the testimony of Director Bill Hinman. We believe that the Morgan Doctrine is what controls here and that Director Hinman is a high-ranking governmental official afforded the protections of the Morgan Doctrine. As such, the sort of burden to take Mr. or Director Hinman's deposition switches over to the defendant here who is seeking the

deposition to establish that extraordinary circumstances are present to warrant the circumstance of taking his deposition. The test under the Morgan Doctrine for whether or not there are exceptional circumstances has been phrased in a couple of different ways, but essentially that the information sought is not obtainable elsewhere and it is personally and uniquely possessed by Director Hinman in this case; and, two, the second prong, is that the information sought is essential, not merely relevant to in this case the LBRY's case.

Many courts actually have a third prong, and, in fact, the Ninth Circuit In Re: U.S. Department of Education, which was cited on February 4th, 2022, has a third prong that there has to be a showing of agency bad faith, and I don't believe that that has been sort of argued here per se, but LBRY in its papers has never suggested or offered that there is agency bad faith and would fail under that third prong of the test. But at least on the papers both parties, I believe, have argued sort of the first and second prong that I identified, and we'll go through that today, your Honor.

As I said, it is LBRY's burden to show these extraordinary circumstances. LBRY has not shown that in its papers. And, first, what LBRY has conceded is that Director Hinman does not possess any knowledge of the case here. He doesn't possess any knowledge about LBRY, doesn't possess any knowledge about LBRY's offer and sales, nor LBC, which is LBRY

credits, token in question.

THE COURT: Let's back up, though, because I do think they challenge your contention that he's a high-ranking government official with a position -- formerly held a position that would qualify for the privilege that you're invoking. I've collected the cases that I can find, and certainly there are cases where a court says this person is a high-ranking official, this person is not a high-ranking official, but what is the principal basis on which I should make the distinction between someone who is sufficiently high ranking to be covered by the privilege?

MR. MOORES: Your Honor, a lot of those cases that I think we've all collected don't articulate a specific test. I think that the case that -- one of the cases that LBRY has cited says it has to be the sort of apex of the agency, but the proof of the cases throughout have shown that it doesn't have to be sort of the highest member of an executive agency, and so I think it ultimately falls back as to the sort of first principles of why the executive privilege or why that protection is afforded, which is essentially that a member of the sort of Executive Branch is not to be hauled into court to testify or to be deposed based upon their decision-making processes. Here we have Director Hinman who is, reports sort of the second highest in terms of he's the head of the division, is in charge of a lot of sort of internal decision

making at the Commission here and advising not only he's also an attorney -- so advising as to policy as well as attorney-client privilege up to the members of the Commission itself. So, I believe that he qualifies in other cases, including the Navellier case that we cited, where it upheld that a division director was a high-ranking governmental official.

THE COURT: Was that issue challenged by the plaintiff in Navellier? I know that the judge applied the privilege and concluded that the official was a high-ranking official, but I didn't see in their evidence that that was a litigated point, a disputed point. Can you help me out on that?

MR. MOORES: So, with respect to whether or not the Morgan Doctrine applied, it was challenged, the Morgan Doctrine specifically applied.

THE COURT: Did they make an argument to the judge that the deponent was not a high-ranking government official under Morgan?

MR. MOORES: My recollection, your Honor, is it at least wasn't sort of foremost in the judge's ruling.

THE COURT: She didn't really explain. I agree she applied it to someone at the same rank as we have here. I just didn't see in her decision that she was evaluating competing claims by the parties and coming down in a particular way on it. So, I think it clearly applies to people like

cabinet-level secretaries, it clearly applies to people like mayors of a city, and it has been widely applied to people who are not at the very top of the agency that they're heading, and I've got examples, and I can draw analogies, but I don't find in any of the case law a detailed discussion of the way in which a judge would go about determining whether someone is or is not a high-ranking official.

The weakness of these kind of categorical approaches to problems are that you don't get to weigh competing considerations and a totality of relevant circumstances sometimes that you would like to be able to do. For example, here it appears that what LBRY wants to do is question the former Director not about any facts about this particular case that that person has knowledge of, because you've proffered that he has no knowledge about this case, was not involved in it, and has nothing to contribute based on personal knowledge about it. Instead, it appears that LBRY is trying to depose this person to gain access to his thought process about how the general issue of how the Howey test applies to digital currencies works, and that seems to be matters of which you would ordinarily not get a deposition for reasons completely unrelated to the Morgan Doctrine. It's the kind of thing that either is simply not calculated to lead to any kind of relevant information at all, or it's protected by the deliberative process privilege. So, I think that's part of the struggle

here.

It is just not apparent to me what this person has to say that could be at all helpful to me in resolving the case, but I did want your thoughts on how I would go about distinguishing between whether someone is a high-ranking official or not. If you've got any other thoughts about it, let me know.

MR. MOORES: Yeah, your Honor. I think that -- first of all, I agree with a lot of what you just said about in terms of the import of what Director Hinman's thoughts are and what LBRY is seeking here, and I do think that there is a relationship between the Morgan Doctrine and sort of deliberative process privilege, which I think you were touching a little bit upon, in terms of seeking the mental decision-making processes of the deponent, and I think that when you have someone who is cloaked with that decision-making authority, which is, I believe, the sort of true import of why LBRY is seeking Director Hinman, himself, they haven't noticed somebody who is sort of lower on the staff or even a sort of, you know, a low member of the staff. They wanted the Director himself, who is cloaked with that authority of decision making on behalf of the Division of Corporation Finance, and so I think sort of the reasons that LBRY is seeking Director Hinman's point of fact that he would be protected under the Morgan Doctrine itself.

THE COURT: Although, the Morgan Doctrine appears to be, rather than the deliberative process privilege, appears to be focused primarily on the need to ensure that high-ranking government officials aren't deluged with deposition requests, because they supervise so many cases and deal with so many issues that they should not be subjected to deposition as a routine matter primarily because of the burden that it inflicts on the person holding the position either as a current officer or former official. So, that seems to be the primary motivation for the doctrine. So, ine one sense, if you were to try to construct a test you would say, well, let's interpret what a high-ranking official is in light of why we have the rule, and we seem to have the rule because someone who is sufficiently high up in a governmental structure can find their lives completely consumed with testifying in depositions of routine cases. I think your argument would be this person oversees hundreds of matters that are potentially the subject of litigation at any one time, and if you do not apply the Morgan Doctrine to someone like this you will overburden the holders of that office both while they currently hold the office and after they complete their government service and move on to other jobs. So, that would seem to be one way of trying to distinguish when someone who is sufficiently high ranking to qualify.

MR. MOORES: Your Honor, I agree. In terms of the

Division of Corporation Finance, it oversees the registration of security offerings that, you know, equate to trillions of dollars and hundreds, if not thousands, of various issuers. So, to the extent that there was ever a decision on the registration that would involve Director Hinman, just with respect to digital assets this is the third case in which Director Hinman has been at least noticed, if not more, and I'm just basing this upon when there have been motions to quash in the Kik case, which we cited in our briefs, and the Ripple matter, which I'm sure you're going to hear at least about from LBRY. So, this is the third time in which he's been hauled in to testify as to his internal decision-making process with respect to digital assets and --

THE COURT: One of the concerns, potential concerns, about extending the doctrine too far down into an organization is that you're unnecessarily insulating people from having to provide information about things that might be very important to a particular litigant. Say, for example, a person holding the Director's position is a witness to allegations of sexual harassment in the workplace. That would be a case in which the availability of that person for deposition would be highly important notwithstanding his or her high position in government, but the way the privilege works, the Morgan Doctrine works under those circumstances it would be relatively easy for someone in LBRY's position to demonstrate that the

Director, although holding a high-ranking position, should not be immune from having to cooperate because they have direct personal knowledge and they are uniquely positioned to contribute in an important way to the case, not simply because they're high up in a chain, where the actual work is being done by people many levels below. That's something that suggests to me that we don't need to be, in determining what is high enough for the Morgan Doctrine to apply, we don't need to be overly concerned that will insulate people from being accountable for their actions to the extent there's some reason to believe that the person has engaged in conduct that might implicate them in some kind of civil liability, or that they're a witness to conduct. Then, even if the Morgan Doctrine applied, it would fit within the exception.

MR. MOORES: Yes, your Honor. I believe the hypothetical you provided does not really touch upon a lot of the main primary concerns of the Morgan Doctrine. You know, if it's an issue of sexual assault, that seems potentially a more of a one-off situation that wouldn't overburden the governmental official as well as something that's, you know, within their knowledge as a potentially percipient witness and does not go to their sort of decision-making in their official duties.

THE COURT: And if there is an allegation, say, that someone at the director level harbored a particular bias and

participated in decisions in a way that potentially provided the target of the decision with a defense, say there was a selective enforcement claim that survived, I've said the selective enforcement defense doesn't survive here, one could say that there's a general Morgan Doctrine applicability; but where the subjective mental state of the Director bears directly on a viable defense, that would be a case where you would find an exception to the Morgan Doctrine.

MR. MOORES: Right, which I think is why you find, if you read the Ninth Circuit's recent opinion and some of the other court opinions that impose the bad-faith prong to the sort of exceptional -- to whether or not the Morgan Doctrine would apply or not, if there is a colorable argument of bad faith, as you're suggesting, with the selective enforcement claim, then that would fall outside of the Morgan Doctrine potentially or at least it would be an exceptional -- extraordinary circumstance which would fall out of the protection of the Morgan Doctrine.

THE COURT: All right. What else did you want to say in support of your argument?

MR. MOORES: Thank you, your Honor. So, with respect to the prong of whether or not the information is otherwise available, this is not something that LBRY, who, again, has the burden to establish is under the Morgan Doctrine, has really put forth in their papers. If we look at some of the topics

that they believe that Dr. Hinman, sorry, Director Hinman would be testifying about, the perception in the marketplace, so if this is what the marketplace was thinking, then that clearly would be available from another source other than Director Hinman. And then the other sort of topics that they've identified, which is the Commission's application of the Howey test, or the Commission's approach in response to market participants, or the status of the Commission's adoption, these are not necessarily topics that are limited to Director Hinman, and, again, if subject to discovery, then they could be achieved in other ways than taking Director Hinman's testimony. So, that would just, that prong alone LBRY fails in its effort to take Director Hinman's testimony.

But more importantly I think, perhaps, is just whether or not it is indeed relevant to this case, and as the standard is, it's not just mere relevance. It actually has to be essential to the defense's argument here, LBRY's argument, and primarily they're offering or they're proffering it that Director Hinman's testimony would be somehow relevant to their fair notice defense for --

THE COURT: I think I've got your argument on that, and my initial reaction is that argument is persuasive, that fair notice defenses really turn on objective evaluations of the available information and not the subjective understandings of the people who are enforcing or promulgating the doctrine

that's being challenged. So, I understand you make that argument. At least my preliminary assessment is that argument is persuasive with me, so I don't need to hear you say more, unless you feel you need to.

MR. MOORES: No, your Honor. The one thing I would note sort of interestingly is LBRY is putting a lot of focus on Director Hinman's speech and believes that it somehow supports their position that the Howey test is too vague as applied to at least LBRY's offer and sales. But Director Hinman throughout his speech in 2018 upholds the Howey test. He's simply applying the Howey test, and the references that he makes to the Howey test are essentially just quoting the prongs of it, where he might say if a promoter does not satisfy prong two, then it's not an investment contract, or if it doesn't satisfy prong three, then it's not an investment contract. So, in any sort of way it doesn't sort of make logical sense that the speech in and of itself would be evidence that the Howey test is too vague, because Director Hinman himself is saying that the Howey test is what controls and, you know, the application of it is the facts and circumstances of the situation.

So, the last point I would make, your Honor, is really just the notion that, even if it was relevant, what they're ultimately seeking, what LBRY is ultimately seeking is stuff that is protected by the deliberative process privilege or the

attorney-client privilege. As I mentioned beforehand, Director Hinman is an attorney, and in his role he would be providing advice to the Commission or the Commissioners, and in terms of developing policy, internal discussions about how that Howey test would apply, the deliberative process privilege would also apply. So, in terms of how --

THE COURT: I think you may be right on that, but if that were all we were dealing with my inclination would be to say you should have the deposition and you object and instruct not to answer, and then the Court can evaluate on a question-by-question basis claims of a deliberative process.

The basic problem for me is I haven't seen anything in LBRY's requests that gives me any encouragement that he has anything to say that would be relevant. I understand your point is that the test here, to the extent the doctrine applies, is much more than mere relevance, but I'm just not seeing what he has to say that's useful at all in this litigation, and so that would be a basis on which to potentially quash a deposition subpoena. If it was just, well, he's got things to say that are protected by the attorney-client or deliberative process privilege, my view is, well, let's see what he says in a deposition and you instruct him not to answer on those questions where there's a potential privilege, and then I evaluate those on a motion to compel. Something like that's the way I would ordinarily do it.

MR. MOORES: I would agree, your Honor. I was just suggesting that under this Morgan Doctrine specifically, and I think you were talking a little bit perhaps outside the Morgan Doctrine just on relevance, but within the construct of the Morgan Doctrine, where LBRY has to establish extraordinary circumstances, ultimately what they're seeking is not available from Director Hinman due to the privileges, and that sort of guts their argument that it is actually relevant or satisfies the extraordinary circumstance.

THE COURT: Your point is to the extent they want to get from him, Tell us what you guys were talking about inside the agency when you were formulating your policies about what would qualify as an investment contract under Howey, your view is that's deliberative process and/or attorney-client, and he would never get it anyway, so he can't satisfy the extraordinary circumstances exception based on that. Okay. I understand your argument.

MR. MOORES: Right. And then, lastly, I know that LBRY has suggested that Director Hinman's testimony would be relevant to its sort of defense in chief, which is just that the offer and sales do not satisfy the Howey test itself, but it doesn't seem that Director Hinman --

THE COURT: No offense to him, but that's my job here, not his. What he says when he speaks as a private citizen, what he says when he gives speeches, my reaction is I could

care less. I mean, that's not something that's entitled to deference under any doctrine that I'm aware of, and in the end of the day I'll make the decision whether the SEC has a viable claim here or not. So, I don't think what he has to say about how he thinks the doctrine works matters at all. Does it? I mean, how does it -- I don't defer to government employees giving speeches on their own dime talking about the way they think the law works. I'm not giving any deference to that. Am I right about that? Do you understand my concern?

MR. MOORES: I do, and I think you are right, your Honor, that the deference is to the precedent and the controlling case law, not to director --

THE COURT: And any regulations or actions that are taken under doctrines like Chevron or similar doctrines in which, when the agency speaks in ways that entitle it to deference, then, of course, the Court would grant deference, but the Court doesn't give deference to agency employees, even high-ranking ones, when they try to say to people what they think the law is. That doesn't get any deference, and so it wouldn't affect my decision making one way or the other.

MR. MOORES: So, your Honor, subject to your questions or rebuttal to what LBRY has to argue, I'll cede the floor.

THE COURT: Okay. Let me see what LBRY has to say.

Go ahead, Counsel.

MR. MILLER: Good afternoon, your Honor. My name is

Keith Miller. I represent LBRY, Inc. I'm a partner at Perkins Coie.

Your Honor, I thought you made a good observation regarding the rationale for the doctrine, and I'd like to elaborate a little bit further on it. First, as I understand, the rationale for the rule is twofold. One is to prevent a chilling effect, if you will, on senior official government officials so that they do not -- their discussions amongst members of the agency are not chilled because of a threat of being deposed. The second rationale, as you stated, is the need to ensure that an official, because of his title, he's not engaged in litigation depositions because of his title.

So, with that rationale I would argue, your Honor, we need to look at what we're trying to get from Mr. Hinman. First of all, we're trying to obtain as a private citizen -- as he said, These are my personal statements -- what he believed was relevant in making determination under Howey whether a digital asset is a security. It's his speech that we're asking to depose him about, not what did the other staff members talk to you about about digital assets. That's not what we're here to ask Mr. Hinman about. We're here -- he made a speech where he drew conclusions as a personal individual. We believe it is very dispositive on the issue of fair notice.

If the Director of -- I'm sorry. If the Director of Corporate Finance has a theory about what the industry does

know and what the industry doesn't know, that's important because it provides a standard. If the entire industry, and we will be presenting evidence at trial on this, if the entire industry doesn't know if a digital asset under these types of circumstances is an investment contract under Howey, okay, that is relevant to evidence at trial to prove that they didn't have fair notice.

THE COURT: So, if he thought -- if a person in his position gave a deposition in this case and took the position that he subjectively thought that LBRY's offerings were registrable securities offerings, that's a fact that I could take into account in deciding whether your client is liable or not? That seems really weird to me. We want to make decisions about whether your client is liable based on the law, not based on what random private citizens think about it.

MR. MILLER: It goes to fair notice, your Honor, what in our papers we've shown. We have Mr. Hinman talking about two digital assets, Bitcoin and Ether, and he concludes that they are not securities, and he also concludes that at some point in time, and his speech is clear on this, and it's also cited by Chairman Clayton in his letter to Congress, that securities that are initially securities can morph if the efforts of others are no longer there. So, we think, and there's never been any communication by the SEC about what are those factors, like when is something a security in the

beginning and then morphs into a non-security? And so, we've raised that as a defense here. In our answer we said, even if it was at some point in time and it is no longer a security because the efforts of others are ministerial, and so, if Hinman were to testify, I went through this process in writing my article and in connection with that I met with industry leaders, I met with lots of different attorneys, and that was the impetus of writing this speech, I think that goes to show or support our argument of fair notice, that there really wasn't fair notice here.

THE COURT: Let's assume that you're right, at least insofar as it bears on your fair notice defense, what Hinman actually publicly says, but that's not what you're seeking to obtain in this deposition, because you already have what he publicly says.

MR. MILLER: Right.

THE COURT: You're trying to get at things he hasn't publicly said but that you think are useful in understanding his thought process. I don't see how that has any bearing on your fair notice defense.

MR. MILLER: Well, we would ask him, What was the rationale for your speech? Why did you put it out? What were your communications with third parties in connection with your speech? What was your application at the time -- how did you apply Howey to Bitcoin and Ether? You know, I think those are

the things that we would explore to try to figure out whether our fair notice defense has further evidence that can be demonstrated at the trial.

THE COURT: Okay. Well, look, I think that's helpful to me, because it does -- you're being frank with me about the kinds of things you want, which I appreciate. It helps me evaluate your request. But I do understand you to be saying that we really want to know what led into his speech, what his thinking was, who he was talking to, what input he was getting for it, because we think that bears on our fair notice defense. That's primarily what you want to talk to him about. Is that fair to say?

MR. MILLER: That's fair to say, and that's, frankly, consistent in how the Court in the Ripple case has approached this, and that is allow Hinman's deposition to occur and to allow limited discovery regarding --

THE COURT: In that Ripple case I'm remembering, if I've got it wrong, you'll tell me, wasn't there an aiding and abetting allegation in that case, and didn't the Court specifically have to be concerned with the subjective mental state of the deponent to evaluate a claim? Much in the nature of before I precluded it you asserted a selective enforcement defense and a kind of bad-faith argument on the part of decision makers, if I allowed that defense this case would look more like Ripple, but it isn't really a Ripple case as it

currently is postured. So, isn't that a way to distinguish Ripple? I think the government makes that point.

MR. MILLER: They do, and in our response, your Honor, we demonstrate why the Court's opinion wasn't solely focused on the aiding and abetting. Ripple and the individuals brought the motion. And so, yes, the Court did mention that the individuals have to substantiate a knowledge prong for aiding and abetting, but it was also for the benefit of Ripple. It wasn't just, Okay, individuals, you can take the deposition, and I think we mention that in our brief at pages 12 and 13.

THE COURT: So, you argue that, but what about Judge Bowler's decision in Navellier? She reached the conclusion that the Morgan Doctrine did apply and protect someone at the very same level. You just say she got it wrong on this one and I should --

MR. MILLER: I think that case, if I remember it correctly, your Honor, I believe that the depositions did take place, but, again, the deliberative process privilege was invoked at the deposition. It wasn't a blanket, absolute prohibition, unless I'm mixing that case --

THE COURT: I may have misunderstood that. Let me ask the government. Just tell me. You're the one that cited Navellier. Is that right, the depositions already took place and it's just a selective -- because that wouldn't make sense to me. That would be a deliberative process privilege, not a

Morgan Doctrine problem.

MR. MOORES: Your Honor, I'll double check on this, but it's my understanding that those depositions did not go forward. It was a former Commissioner and it was the Director of Enforcement. My understanding is that neither of those went forward.

THE COURT: Yeah, the Morgan Doctrine is designed to prevent the deposition entirely, not to prevent selective -- to protect certain answers once the deposition is underway. That's really more deliberative-process privilege kind of issues. If you allow the deposition, the ordinary rules govern how the deposition takes place. That's the way I thought the Morgan Doctrine worked. Okay. So, you'll both check on that and let me know if you come up with anything, and I'll go back over it, but I didn't recollect that the depositions, in fact, occurred. There were other depositions, but those depositions I don't think did occur.

Okay. So, Counsel, can you help me out on this? What do you think is the way to distinguish a high-ranking official from a non-high-ranking official for purposes of the doctrine?

MR. MILLER: I think you need to go back to the rationale again, which is the need to ensure that an official in his official capacity isn't being burdened. Mr. Hinman is no longer an official. So, that argument I think is much more supportive of our argument.

THE COURT: I do think it's a relevant factor in determining if they are a high-ranking official potentially able to invoke the Morgan Doctrine whether there should be an exception. I think it's a factor but not determinative. That's how I process it. Do you agree or disagree?

MR. MILLER: Yeah, I agree. I do agree. And we also say in terms of looking at, as you said, there are cases on both sides where a mayor is clearly, you know, a top-ranking official and when there's other deputies, things like that, depending on the agency. So, we need to look at the SEC. The SEC is run by the Chairman and four Commissioners. We're not asking for their depositions. Underneath are five Division Directors and 25 other offices that report to the office of the Chairman. You've got Chief Accountant's office, you have Head of Public Affairs, you have legislation and inter-government affairs, you have the various divisions, Enforcement, things like that. Our position would be in this context Mr. Hinman is not a high-ranking official because he's not at the apex of the decision making. And so, a lot of these cases talk about the apex, and I've been trying to figure out what is apex, what isn't, and I think it comes down to can they make the ultimate decision.

THE COURT: Well, if you believe in the unitary executive theory, there's only one person at the apex of the Federal Government, and that's the President of the United

States. So, it clearly doesn't mean that, because it applies to a secretary, it applies to cabinet secretaries, and it would clearly apply to the SEC Commissioners and the Chair of the Commission. The question is does it ever apply below that level in an organization like the SEC, and I don't think there's been a well-reasoned decision that I've seen that helps inform how a court should go about undertaking that analysis, so what we're left with are a bunch of analogies where the court applied it this way and the other court applied it that way.

What I'm inclined to do is to say that we should evaluate high ranking not in any kind of absolutist or categorical way; we should really look at what the functions of the office are, and if those functions are such that that person is likely to be involved in highly voluminous, complex, discretionary decision making, where the person exercises a policy formulation role and isn't simply executing policies established at lower levels, that you probably ought to think of that person as high ranking because, given the exposure that that person has to potential litigation, the burdens on the office could be extraordinary, as opposed to, say, a line SEC attorney, like the one that's currently arguing in front of me, who's not a high-ranking official, but when you go sufficiently up the policy chain that that person is effectively a manager of a big portfolio where hundreds and thousands of decisions

are being made by subordinates and reviewed that that person is sufficiently high ranking to potentially qualify.

And then, in my mind, we should police the extraordinary circumstances exception reasonably to allow exceptions like the one I proposed, where someone has direct personal knowledge of a matter that isn't part of his management portfolio where he's indirectly supervising a bunch of stuff but he, in fact, or she, in fact, witnessed something if it happened in the office that gives rise to potential liability. Then you would easily find the exception satisfied, because that person has unique and very important information as opposed to information that is largely derivative about policymaking or execution of policy.

So, that's how I'm inclined to look at it, and anything else you want to say on that subject go ahead, and then make any other points you want to make on the particular issue.

MR. MILLER: Just a final point is, again, I think the Court should view this as an individual, yes, he was at an agency, but expressed an opinion, their personal opinion, and for that reason I think the exceptions to Morgan, the Morgan Doctrine, apply, and the rationale for the Morgan Doctrine would not apply in this situation.

THE COURT: All right. Thank you. I appreciate the argument on it.

So, in preparation for the hearing today I carefully reviewed the Supreme Court's decision in Morgan. I read the First Circuit's decision in Bogan against the City of Boston reported at 489 F.3d 417, a 2017 First Circuit decision, which is, of course, controlling precedent in my case.

I tried to look at how other courts dealt with the issue of whether someone is a high-ranking official or not, and, as I have suggested to you, I don't think there are an abundance of well-reasoned decisions, certainly nothing that's controlling on me. Let me just identify a couple of examples that I think are somewhat helpful, although the reasoning provided is very limited.

I did look at the case of RI, Inc. against Gardner, which is reported at 2011 Westlaw 4974834, an Eastern District of New York decision from 2011 that held that the Solicitor General of the United States Department of Labor was a sufficiently high-ranking official to qualify under the Morgan Doctrine.

I looked at a decision from the District of New Jersey, U.S. against Sensient, S-e-n-s-i-e-n-t Colors, Inc., reported at 649 F.Supp. 2d 309, a 2009 District of New Jersey decision, where the Court held that an EPA regional administrator was a high-ranking government official.

And I looked at a decision from the District Court of the District of Columbia, Low against Whitman, reported at 207

F.R.D. 9, where the Court concluded that the EPA's Deputy Chief of Staff did qualify as a sufficiently high-ranking person.

Finally, I looked at, again, a District of -- Columbia District Court decision, Sourgoutsis, S-o-u-r-g-o-u-t-s-i-s, against United States Capitol Police, 323 F.R.D. 100, a 2017 District of Columbia District Court decision where the Court held that the Inspector General of the United States Capitol Police was a high-ranking official for the purpose of the Morgan Doctrine.

As I said, my inclination, in the absence of more specific guidance from the First Circuit or the Supreme Court, is to suggest that in determining whether someone's a high-ranking official you shouldn't look at a simple categorical approach of are they the highest ranking official in their agency. Rather, I think you should look at it functionally, and do they perform functions that involve supervision of a large number of subordinate employees that are responsible for carrying out the day-to-day operations of that particular governmental agency, whether they are involved in overseeing substantial amounts of government activity that could potentially expose them to hundreds of thousands of lawsuits if they were routinely subject to deposition, and judged by that standard -- and I do believe, as I said, that the Navellier case that I've previously cited supports this.

I do believe that potentially that the former Director

does qualify as a high official. The fact that he's a former official is a factor to consider but isn't dispositive, because, again, we don't want people who take these positions when they do leave office to spend the rest of their life taking depositions, responding to efforts to establish whatever it is that the litigant wants to establish. So, I do think that this former Director does have a position that potentially qualifies him under the Morgan Doctrine for protection against deposition.

What's really important to me here, though, is I just do not understand how the former Director has anything to contribute here. And I respect Mr. Miller's argument, and I appreciate his frankness. I don't think that questions about what drove him to make the speech, who he communicated with when he made the speech, what his internal thought process was, or who he may have been deliberating with while formulating his views on this matter come anywhere close to satisfying an extraordinary circumstance test. To the extent he wants to use the testimony to convince me that it was widely understood in the marketplace that there was a particular view about how the Howey test applies, that could be established from people other than the former Director. One could imagine an expert witness that might testify about that, one could imagine people engaged in the industry that might be able to testify about that, and I don't believe that that information would be uniquely available

from the former Director.

More fundamentally, I just don't see how that information has any potential relevance to the proceeding. The way I'm seeing it, the primary defenses here are this just doesn't qualify under Howey, it's not an investment contract, the SEC can't prove its case, and, in any event, we have a viable fair notice defense. Both of those issues turn on objective facts, the Director has no personal knowledge of the particulars of this case, and in my view the fair notice defense really turns on objective criteria, not subjective thought process of the individual involved, and I do agree that it's likely that, to the extent one wants to get into that, it's hard for me to see how it isn't protected by the deliberative process privilege, and so it wouldn't be available, in any event. So, I don't believe that the exceptional circumstances test comes anywhere close to being satisfied here.

So, for those reasons and the additional reasons set forth in the SEC's supporting memorandum I'm going to grant the Motion for Protective Order and bar the deposition of the former Director.

Does anybody need me to make any additional findings or rulings with respect to that particular issue?

Is there anything else from the SEC that you feel I need to take up that I haven't taken up?

MR. MOORES: Not as to that motion, your Honor.

THE COURT: All right. Mr. Miller, anything else? Your objections are all preserved, of course, for purposes of appeal. Is there anything else you need me to take up that I haven't taken up on that particular --

MR. MILLER: No, your Honor.

THE COURT: All right. So, let's turn to the next matter, which is a proposal by the SEC to delay the scheduling of this case.

Counsel, one thing that has really resonated with me in this case is that LBRY feels extremely burdened by this litigation. Now, you make arguments that everything you've done is appropriate and the discovery requests to date have not been overly burdensome, but this is a company that is clearly not in great financial circumstances. This has a big bearing on their efforts to survive. This has been going on for years. To the extent they oppose delays, I want to try to keep this matter moving. On the other hand, your point is you think that they have -- if I'm understanding your position correctly, your position is that LBRY, without making it clear to you initially, has arbitrarily drawn a self-imposed line on what discovery they're going to produce and that they're not -- they haven't produced anything post filing of the complaint. Am I overstating your position, or is that your position?

MR. MOORES: Your Honor, there's a lot that's true.